

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2004 - 0001

In the Matter of the Petition of

CALIFORNIA FORESTRY ASSOCIATION

For Review of Conditional Waiver of Waste Discharge Requirements
for Discharges Related to Timber Harvest Activities in the Lahontan Region,
Resolution No. R6T-2003-0001

Issued by the
California Regional Water Quality Control Board,
Lahontan Region

SWRCB/OCC FILE A-1546

BY THE BOARD:

I. INTRODUCTION

On January 8, 2003, the Lahontan Regional Water Quality Control Board (Regional Board) adopted Resolution No. R6T-2003-0001, which established a new conditional waiver from issuance of waste discharge requirements for discharges resulting from timber harvesting activities. On February 7, 2003, California Forestry Association (CFA) filed a petition with the State Water Resources Control Board (State Board or Board) requesting review of the Regional Board resolution adopting the waiver.¹ On August 13 and 14, 2003, the State Board held a consolidated evidentiary hearing on the petitions in this matter and on similar petitions requesting review of waivers adopted by the Regional Water Quality Control Boards for the North Coast and Central Valley Regions.²

¹ The State Board is reviewing the issues raised in the petition pursuant to its authority to review actions of a regional board on its own motion. (Cal. Code Regs., tit. 23, § 2050.5(c).)

² The issues raised in the petitions vary depending upon the region in question and the party filing the petition(s). Two petitions were filed concerning the waiver adopted by the Central Valley Regional Water Quality Control Board, one petition was filed concerning the waiver adopted by the Lahontan Regional Water Quality Control Board and another was filed concerning the waiver adopted by the North Coast Regional Water Quality Control Board. Although the hearing on the four petitions was consolidated for purposes of convenience and efficiency, the State
[footnote continued next page]

Based on our review of the record, we conclude that in adopting Resolution No. R6T-2003-0001 establishing the categorical waiver for timber harvest activities, the Regional Board complied with the requirements of the Water Code. However, this Order also concludes that certain provisions of the new conditional waiver should be stricken due to vagueness. Additionally, it is appropriate to include a provision in the conditional waiver indicating that its terms do not apply to discharges requiring a National Pollutant Discharge Elimination System (NPDES) permit. We also find it appropriate to request Regional Board staff to participate in the cumulative effects workgroup in a manner that avoids duplication of effort yet ensures that region-specific issues are considered.

II. BACKGROUND

A. Regulation of Timber Harvesting by the California Department of Forestry and Fire Protection and the United States Forest Service

Timber harvesting activities on non-federal lands in California are regulated primarily by the California Department of Forestry and Fire Protection (CDF) and the Board of Forestry (BOF). CDF regulates timber operations pursuant to the Z'berg-Nejedly Forest Practice Act (Forest Practice Act),³ the California Forest Practice Rules (Forest Practice Rules),⁴ and the California Environmental Quality Act (CEQA).⁵ CDF utilizes an interagency review team process for the evaluation of proposed timber harvest plans (THPs). The THP review process has been certified as functionally equivalent to the CEQA process governing preparation of negative declarations and environmental impact reports. (Cal. Code Regs., tit. 14, § 15251(a).)

In 1988, the State Board certified the “Water Quality Management Plan for Timber Operations on Non-Federal Lands,” which included those Forest Practice Rules selected as best management practices and the process by which those rules are administered. Also in 1988, the State Board designated CDF and BOF as joint Water Quality Management Agencies (WQMA) and executed a Management Agency Agreement with CDF and BOF for the purpose

Board’s review of issues regarding the waiver adopted by each regional board is limited to those issues raised in the petition(s) filed concerning the waiver at issue.

³ Pub. Resources Code, § 4511 et seq.

⁴ Cal. Code Regs., tit. 14, § 895 et seq.

⁵ Pub. Resources Code, § 21000 et seq.

of implementing the certified plan. The Management Agency Agreement between the State Board, CDF and BOF required a formal review of the Forest Practice Rules and administering process no later than six years from the date of certification. To date, that review has not occurred. The United States Environmental Protection Agency (USEPA) has not approved the State Board's certification of the Forest Practice Rules and administering processes for regulation of timber harvest activities on non-federal lands in California.

Timber harvesting activities on National Forest lands in California are regulated primarily by the United States Forest Service (USFS). In 1981, the State Board designated the USFS as the WQMA for timber harvest activities on National Forest System lands. The USFS implements certified "best management practices" and procedures for protection of water quality as identified in the document entitled, "Water Quality Management for National Forest System Lands in California" and the 1981 Management Agency Agreement between the State Board and USFS. The Management Agency Agreement with USFS contemplates that the regional water quality control boards (regional boards) will waive issuance of waste discharge requirements for USFS timber harvest activities that may result in nonpoint source discharges provided that the USFS designs and implements its projects to fully comply with state water quality standards. The environmental impacts of timber harvest activities on federal lands must be addressed and mitigated in accordance with the federal timber harvest planning process pursuant to the National Environmental Policy Act (NEPA). (42 U.S.C. §§ 4321 et seq.)

The regional boards regulate possible water quality impacts of timber harvest activities by participating in the CDF and USFS timber harvesting review processes and by exercising the independent authority granted under the Porter-Cologne Water Quality Control Act.⁶ (Wat. Code, §§ 13000 et seq.)

⁶ In addition to the regional boards' authority under the Porter-Cologne Water Quality Control Act, beginning January 1, 2004, the regional boards also have authority to prevent approval of timber harvesting plans on non-federal land if: (1) the proposed timber operations will result in a discharge into watercourse that has been classified as impaired due to sediment pursuant to section 303(d) of the Clean Water Act; and (2) the discharge will cause or contribute to a violation of the Basin Plan. (See Pub. Resources Code § 4582.71, subd. (a), as added by Senate Bill 810, Stats. 2003, Ch. 900, § 3.)

B. Statutory Provisions Regarding Waivers of Waste Discharge Requirements Adopted by the Regional Water Quality Control Boards

The record includes extensive evidence demonstrating that timber harvesting and related activities can result in the discharge of sediment and other waste material into nearby streams and rivers. Water Code section 13263 provides that the regional boards shall prescribe requirements regulating waste discharges that implement the provisions of applicable water quality control plans. Since 1969, Water Code section 13269 has authorized regional boards to waive reports of waste discharge and issuance of waste discharge requirements for specific discharges or types of discharges if the waiver is not against the public interest. Waivers of waste discharge requirements for specific types of discharges are called “categorical waivers.” Section 13269 provides that waivers must not be against the public interest, that all waivers are conditional, and that waivers may be terminated at any time by a regional board. Subdivision (e) of section 13269 provides that the regional boards and the State Board “shall require compliance with the conditions pursuant to which waivers are granted under this section.” Water Code section 13350 authorizes the State Board, regional boards, or a court to impose civil liability upon anyone who discharges waste or causes waste to be deposited where it is discharged into waters of the State.⁷

In 1999, Water Code section 13269 was amended to provide that all waivers in effect on January 1, 2000, would expire on January 1, 2003, unless renewed by a regional board. Section 13269 further provides that categorical waivers may not exceed five years, but may be renewed in five-year increments. Subdivision (f) of section 13269 requires that, prior to renewing a categorical waiver, a regional board must determine whether the type of discharge covered by the waiver should be regulated under general or individual waste discharge requirements.

Section 13269 was amended again following the adoption of the Waiver. Effective January 1, 2004, waivers must be consistent with any applicable water quality control plans, and must include monitoring provisions. The amendment also authorizes the State Board

⁷ Water Code section 13350 previously authorized assessment of civil liability on those who intentionally or negligently discharge waste or cause waste to be discharged into the waters of the State. The Legislature recently amended section 13350 to delete the requirement that a discharge be intentional or negligent in order for civil liability to be imposed. (Assembly Bill 897, Stats. 2003, ch. 683, § 4.)

to adopt annual fees for recipients of waivers. (See Wat. Code § 13269, subd. (a)(4)(A), as amended by Senate Bill 923 [SB 923], Stats. 2003, ch. 900, § 1.)

C. The Waiver of Waste Discharge Requirements for Timber Harvesting Adopted by the Lahontan Regional Water Quality Control Board

1. Procedural Background

In 1988, the Regional Board adopted Resolution No. 6-88-18 (1988 Waiver), which waived waste discharge requirements for timber harvesting activities. Pursuant to Water Code section 13269, the 1988 Waiver terminated at the end of 2002. Prior to the termination of the 1988 Waiver, the Regional Board held public workshops on August 29, 2002, in South Lake Tahoe and on September 4, 2002, in Victorville. Neither petitioner CFA nor the Environmental Petitioners in the consolidated matter attended these workshops. (Exhibit R6-2 at p. 10-11.)

However, at the Regional Board's January 8, 2003, board meeting, a representative for CFA appeared and argued that a conditional waiver was not necessary in the Lahontan Region, some of the terms in the proposed waiver conflicted with the Forest Practice Rules, and that its monitoring provisions were overly broad. The Regional Board adopted the new conditional waiver for discharges from certain timber harvesting activities and approved the accompanying Initial Study and Negative Declaration. The waiver is contained in Attachment 1 to Resolution No. R6T-2003-0001 (Waiver) and replaces the 1988 Waiver.

2. The Terms of the Waiver⁸

The Waiver waives the requirement to submit reports of waste discharge and to obtain waste discharge requirements for most timber harvesting activities on non-federal and federal lands. THPs, Non-Industrial Timber Management Plans (NTMPs), Emergencies, Exemptions and any other project consisting of "timber operations" as defined by the Forest

⁸ The waivers adopted by the Central Valley and Lahontan Regional Boards are identical in most respects, except for a few differences. Some of the key differences are itemized herein. First, the Central Valley Regional Board's waiver indicates that its staff will meet periodically with major stakeholders to address water quality issues on a watershed basis. (Resolution No. R5-2003-0005 at p. 5, ¶ 13.) No such provision is included in the Lahontan Regional Board's Waiver. Second, the Central Valley Regional Board's Waiver expires on January 30, 2005, while the Lahontan Regional Board's waiver expires on December 31, 2007. Third, the definition of "Timber Harvest Activities" in the Lahontan Regional Board's waiver includes "herbicide application" while the definition in the waiver adopted by Central Valley Regional Board does not. Fourth, the Central Valley Regional Board included a General Condition indicating that its waiver does not apply to discharges requiring NPDES permits under the Clean Water Act. No such express provision exists in the waiver adopted by the Lahontan Regional Board. Finally, the eligibility criteria and conditions for each category in the waivers vary in some respects.

Practice Act are potentially eligible for coverage under the Waiver, as are silvicultural activities on federal lands managed by the USFS.

The Waiver is a significant change in the manner of regulating discharges from timber harvesting activities. It divides timber harvest activities into categories that contain specific eligibility criteria that an applicant must meet in order to gain coverage under the Waiver. By contrast, the 1988 Waiver simply waived waste discharge requirements for USFS-approved silviculture activities and for a subset of CDF-approved timber operations.

The Waiver became effective on January 8, 2003, and expires on December 31, 2007, unless the Regional Board formally terminates the Waiver or the Executive Officer terminates the Waiver's applicability to a specific discharge. It regulates earthen materials, including soil, silt, sand, clay, rock; organic materials, such as slash, sawdust or bark; and silvicultural pesticides that enter or threaten to enter into waters of the State. Wastes not covered include petroleum products, hazardous materials, and human wastes.

a. "Pre-Conditions"

The Waiver for non-federal lands is effective only if two initial conditions are met. The first condition is that the State Board continues to certify the "Water Quality Management Plan for Timber Operations on Non-Federal Lands in California," including those Forest Practice Rules selected by the State Board as best management practices, and continues to designate CDF and BOF as the joint management agencies. The other condition is that the BOF and CDF adopt and implement a water quality regulatory program consistent with the Lahontan Region's Water Quality Control Plan (Basin Plan) as well as a timber harvest verification system with inspection, monitoring, surveillance, and enforcement.

Likewise, the Waiver for federal lands is effective only if two conditions are met. The first is that the State Board continues to certify and the USEPA continues to approve the "Water Quality Management for National Forest System Lands in California" including the designation of the USFS as the management agency. The second is that the USFS maintain a water quality program consistent with the Lahontan Region's Basin Plan and the requirements of all other applicable water quality control plans, and maintains a program to monitor the implementation and effectiveness of best management practices.

b. General Conditions

Seven General Conditions apply to each of the five waiver categories. Generally, these conditions require that the Discharger⁹ comply with all applicable water quality control plans; conduct timber harvest activities in accordance with the approved Plan;¹⁰ refrain from creating pollution, contamination, or nuisance; refrain from discharging waste that is not specifically regulated by the waivers; allow Regional Board staff reasonable access onto the affected property in order to perform inspections and conduct monitoring whenever requested; and file the applicable eligibility documents with the Regional Board. (See Waiver at pp. 3-4.)

c. The Five Categories of Timber Harvesting Activities Covered Under the Waiver

Following the General Conditions is a section entitled “Category-Specific Conditions.” Each category contains a section describing the eligibility criteria for qualifying under that category as well as a section describing the conditions a Discharger must meet to receive a waiver. Categories 1 through 4 apply to timber harvest activities on nonfederal lands and Category 5 applies to activities on USFS lands.

(1) Category 1: Minor Timber Harvest Activities on Non-Federal Lands

THPs may obtain coverage under Category 1 if they satisfy sixteen eligibility criteria consisting of various management practices. These management practices include: limiting timber harvesting and use of equipment on land with slopes exceeding a specified rating; prohibiting heavy equipment operations on unstable areas and in meadows or wetlands; prohibiting construction of logging roads and watercourse crossings; prohibiting timber harvest activities that may disturb, threaten, or damage aquatic or wetland habitat for rare, threatened, or endangered plants or animals; prohibiting timber harvest activities from October 15th through May 1st or when soil is saturated; and prohibiting timber harvest activities that are accompanied by prescribed burning or post-harvest applications of pesticides. (See Waiver at pp. 4-5.)

Category 1 is intended for minor timber harvest activities that pose a low threat to water quality because little or no discretionary interagency review will occur. (Exhibit R6-2 at

⁹ For non-federal land, the term “Discharger” includes the timberland owner and anyone working on behalf of the timberland owner. For federal lands, “Discharger” refers to the USFS and anyone working on its behalf. (Waiver at p. 2.)

¹⁰ The Waiver’s definition of “Plan” includes Timber Harvest Plans (THP), Non-Industrial Timber Management Plans (NTMP), or other discretionary permits issued by CDF. (Waiver at p. 2.)

p. 13.) Dischargers may obtain coverage under Category 1 by submitting a copy of a CDF-approved Plan or a CDF-accepted exemption or emergency notice that adopts the sixteen criteria listed in the Waiver. The landowner also must submit a notice certifying that the timber harvest activities will comply with these criteria. (Waiver at pp. 5-6.)

(2) Category 2: Exempt or Emergency Timber Harvest Activities on Non-Federal Lands That Do Not Qualify for Waiver Under Category 1

Regional Board staff anticipated that some of the projects approved by CDF as “exempt” or “emergency” would not meet all of the eligibility criteria for a Category 1 waiver. (Exhibit R6-2 at p. 15.) Accordingly, Category 2 is intended for logging projects that receive nondiscretionary approval from CDF, but do not meet all of the Category 1 eligibility criteria. (*Ibid.*)

Under Category 2, the discharger must hire a Registered Professional Forester (RPF) to conduct a comprehensive field review of the proposed timber harvest activities. (Waiver at p. 6.) The RPF must specify management practices and/or water quality protective measures that, where appropriate, go beyond the requirements of the Forest Practice Rules to ensure compliance with the Basin Plan. (Exhibit R6-2 at p. 17.) Where timber harvest activities may impact aquatic or wetland habitat for rare, threatened or endangered species, a scientist experienced in aquatic systems must conduct additional field review to determine if the timber harvest activities could adversely affect the species or its habitat. (*Ibid.*) Category 2 also requires that certain management practices be included in the THP, such as an Equipment Limitation Zone for Class III and IV watercourses. (*Id.* at p. 7)

To obtain coverage under Category 2, the Discharger must certify that the timber harvest activities will comply with all applicable conditions, notify the Regional Board of any proposed application of pesticides, comply with a monitoring program when directed by the Executive Officer, and submit a final certification to the Regional Board after completion of the timber harvest activities. (Waiver at pp. 7-8.)

(3) Category 3: Timber Harvest Activities on Non-Federal Lands That Receive Discretionary Approval from CDF and for Which Regional Board Staff Has Fully Participated in the Interdisciplinary Review Team Process

Timber harvest activities qualify for coverage under Category 3 where Regional Board staff has participated in CDF’s interdisciplinary review process and onsite pre-harvest

inspection and CDF has approved the THP. Where necessary, additional management practices and/or water quality protective measures beyond those identified in the Forest Practice Rules must be included in the THP. (Waiver at p. 8.)

The conditions for obtaining coverage under Category 3 are similar to those under Categories 1 and 2. However, in addition, the Discharger must submit a Notice of Timber Operations within 30 days of the commencement of timber harvest activities. The Discharger also must submit a final certification to the Regional Board after completion of the timber harvest activities, as well as copies of annual or completion reports filed with CDF. (*Id.* at pp. 8-9.)

(4) Category 4: Timber Harvest Activities on Non-Federal Lands That Receive Discretionary Approval from CDF and for Which Regional Board Staff Has Not Fully Participated in the Interdisciplinary Review Team Process and Which Are Not Eligible for a Waiver Under Category 1

Projects for which CDF requires THPs are generally larger than “exempt” or “emergency” projects and may pose a greater threat to water quality. (Exhibit R6-2 at p. 17.) Therefore, Dischargers who seek coverage under Category 4 must meet more detailed eligibility criteria and conditions. (*Ibid.*) As with Category 2, coverage under Category 4 requires that the Discharger hire an RPF to conduct a field review of the proposed timber harvest activities. (Waiver at pp. 9-10.) Category 4 also requires additional field review by a scientist where timber harvest activities may impact aquatic or wetland habitat for rare, threatened or endangered species. (*Id.* at p. 10.) Where timber harvest activities are proposed in areas with extreme erosion ratings or a history of slides and unstable areas, a qualified engineer must review the proposed Plan and specify appropriate mitigation measures. The Plan must include any relevant technical reports and must incorporate additional management practices and/or water quality protection measures beyond the requirements of the Forest Practice Rules, necessary to comply with the Basin Plan. (*Id.* at pp. 10-11.)

The conditions for obtaining a Category 4 waiver are identical to those for Category 3.

(5) Category 5: Timber Harvest Activities on Federal Lands Managed by the USFS

To meet the eligibility criteria for a Category 5 waiver, the proposed Plan must be the product of the USFS multi-disciplinary review process. Additionally, the USFS must

conduct a cumulative watershed effects analysis, include specific measures to reduce the potential for such effects, and provide a reasonable opportunity for public participation and comment. The conditions for obtaining coverage under Category 5 are similar to those described above.

D. Summary of Petition for Review

CFA alleges that the Waiver is inconsistent with applicable State Board rules and policies, including the state's Nonpoint Source Pollution Control Program, and that the Regional Board exceeded its statutory authority.

III. CONTENTIONS AND FINDINGS¹¹

A. The Waiver Is Consistent With State Board Rules and Policies.

Contention: CFA contends that the Waiver is inconsistent with the State Board's rules and policies, specifically the Plan for California's Nonpoint Source Pollution Control Program (NPS Plan). CFA further asserts that the NPS Plan requires that the principal means of controlling NPS pollution is the development, implementation, and monitoring of Best Management Practices (BMPs) through the "Three-Tiered Approach." The Three-Tiered Approach uses progressively more stringent regulatory options.

Finding: It appears that many of CFA's contentions are based upon the 1988 version of the NPS Plan, rather than the more current version adopted in the year 2000. CFA asserts that Tier Two of the Three-Tiered Approach requires either the adoption of waivers of waste discharge requirements conditioned upon BMPs *or* entering into a Management Agency Agreement where the Managing Agency has authority to adopt and enforce BMPs. Since the State Board has entered into Management Agency Agreements with CDF, BOF, and the USFS, CFA contends that the Regional Board should have adopted a waiver that relies solely upon these agreements and the Forest Practice Rules. We disagree.

The NPS Plan provides a recommended regulatory approach, but does not disturb the Regional Board's discretion to choose the appropriate course of action. (See NPS Plan at p. 55 ["In practice, the [regional boards] will determine which or what combination of the three

¹¹ This Order does not address all of the issues raised by the Petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349], Cal. Code Regs., tit. 23, § 2052.)

options will be used to address any given NPS problem.”].) Further, in adopting the NPS Plan, we recognized that the Forest Practice Rules should be improved to address discharges from certain aspects of silvicultural operations. (NPS Plan at pp.112-116.)

Additionally, the Forest Practice Act does not limit the authority of the regional boards or any other state agency. (See Pub. Resources Code, § 4514, subd. (c) [“No provision of this chapter or any ruling, requirement, or policy of the board is a limitation on . . . the power of any state agency in the enforcement or administration of any provision of law which it is specifically authorized to enforce or administer.”].) Therefore, the Regional Board may properly require the implementation of management practices above and beyond those contained in the Forest Practice Rules.

Extensive evidence exists to indicate that the Regional Board’s adoption of the Waiver was appropriate. Impairment of various water bodies in California has occurred under the previous regulatory scheme that generally did not require implementation of management practices beyond those by the Forest Practice Rules for timber harvesting on non-federal lands. USEPA has declined to approve the Forest Practice Rules as BMPs in California, stating that “the continuing impacts of timberland management lead us to conclude that the [State Board] and [regional boards] should not automatically waive direct regulation of silvicultural activities.” (Correspondence dated July 11, 2002, to State Water Resources Control Board from USEPA, Region IX.) Many of the management practices incorporated into the Waiver are of the type that Regional Board staff would recommend to be incorporated into a THP when fully participating in the interdisciplinary review team process.

In light of the staff limitations and evidence that the Forest Practice Rules alone are not sufficiently protective of water quality, we find the Regional Board’s adoption of a waiver requiring the implementation of management practices that go above and beyond those required under the Forest Practice Rules was reasonable.

Contention: CFA contends that the Waiver violates the prohibition on specifying the means of compliance contained in Water Code section 13360.

Finding: This argument ignores the fact that the Waiver is optional and no Discharger is required to obtain coverage. We also have stated that a regional board has the authority to specify the management practices necessary to qualify for a conditional waiver. (See

NPS Plan at p. 57 [“[Regional Boards] have discretion in deciding what BMPs to encourage through conditional waiver of [waste discharge requirements].) Therefore, we find this argument to be without merit.

B. The Regional Board Did Not Exceed Its Statutory Authority

Contention: CFA asserts that the Waiver unlawfully expands the Regional Board’s authority under section 13267 of the Water Code, which provides that a regional board may require technical or monitoring reports when investigating the quality of waters within its region. Conditions in the Waiver state “[t]he discharger shall comply with a monitoring program when directed in writing by the Executive Officer.” Because there are no limitations, CFA asserts that this provision exceeds the scope of section 13267.

Finding: Monitoring is a reasonable requirement consistent with the Regional Board’s objective of protecting water quality. The Waiver in no way requires monitoring universally. Rather, it provides the Executive Officer with discretion to require monitoring when appropriate.

CFA also cites *Pacific Lumber Company v. California State Water Resources Control Board* (2003), Case No. DR010860, in support of its assertion that the Waiver’s monitoring provisions exceed the Regional Board’s statutory authority. *Pacific Lumber Company* is an unpublished opinion of the Superior Court currently under appeal. Therefore, we do not rely on that decision in this order. We also note that the *Pacific Lumber Company* opinion is arguably inconsistent with section 4514 of the Public Resources Code, which expressly preserves a state agency’s statutorily prescribed authority.

Further, following the adoption of the Waiver, Water Code section 13269 was amended again. Effective January 1, 2004, waivers must be consistent with any applicable water quality control plans, and must include monitoring provisions. (SB 923 at § 1.) Such monitoring requirements must be designed to support the development and implementation of the waiver program. We find that any requirement for monitoring imposed by the Regional Board must be consistent with the provisions of SB 923. Likewise, any such monitoring requirement must be consistent with Water Code section 13267, which provides that the costs of the monitoring be considered and bear a reasonable relationship to the need for the reports and benefits to be obtained.

Contention: CFA alleges that the Waiver exceeds the Regional Board's authority to enter and inspect private property. The Regional Board's existing authority is pursuant to Public Resources Code section 4604(b)(1) which provides that a regional board, if accompanied by CDF and after 24-hour advance notice, may enter and inspect land during normal business hours at any time after commencement of timber harvest activities.

Finding: The provision allowing inspection of property is standard in most regulatory actions by the State Board and regional boards. General Condition 5 requires the Discharger to give Regional Board staff reasonable access onto the property for the purpose of performing inspection and conducting monitoring. (Waiver at pp. 3-4.) A Discharger who seeks a waiver of waste discharge requirements is appropriately expected to consent to reasonable access to its property.

Contention: CFA asserts that the Waiver exceeds Regional Board jurisdiction by directly regulating impacts on rare, threatened, or endangered species and their habitats.

Finding: The Forest Practice Rules specify that an RPF may determine the impacts on virtually any feature encountered in a THP, including impacts on the natural resources of the State. (Cal. Code Regs., tit. 14, § 1092.12.) The Waiver does not regulate rare, threatened, or endangered species directly. Rather, it protects the aquatic habitat for such species, a beneficial use identified in the Basin Plan. (See Exhibit R6-1 at p. 5.) We find that the Regional Board may properly regulate impacts to the beneficial uses of water as identified in the Basin Plan.

C. Provisions To Be Stricken From the Waiver

1. One of the General Conditions Shall Be Stricken

The Waiver for non-federal lands is effective only if two initial conditions are met. The second of these conditions is that the BOF and CDF adopt and implement a water quality regulatory program consistent with the Basin Plan as well as a timber harvest verification system with inspection, monitoring, surveillance, and enforcement. Including this condition is problematic because it implies that the desired program is not now in effect, which makes whether or not the Waiver is currently operative unclear. Therefore, we hereby strike this condition from the Waiver.

2. The Phrase “and herbicide application” Shall Be Stricken From the Definition of “Timber Harvest Activities”

The Waiver’s definition of “Timber Harvest Activities” includes “herbicide application.” Accordingly, all of the eligibility criteria for each of the five categories that apply to “timber harvesting activities” also apply to the use of herbicides. (This is one of the key differences between the Waiver at issue and the waiver adopted by the Central Valley Regional Water Quality Control Board.) Since these management practices were designed to limit the discharge of sediment, it was not reasonable to include herbicide use in the definition of timber harvesting activities.

However, we find that it was reasonable to require notice of any proposed herbicide application since herbicides associated with silvicultural activities may result in impacts to water quality. This requirement is already included in the conditions for Categories 2 through 4.

D. Provision To Be Added to the Waiver

Unlike the waiver adopted by the Central Valley Regional Water Quality Control Board, the Lahontan Regional Board’s Waiver does not include a General Condition indicating that discharges requiring National Pollutant Discharge Elimination System permits (NPDES permits) are not covered. The State Board, the regional boards, and USEPA traditionally have not required NPDES permits for discharges associated with forest roads and other types of discharges associated with timber harvesting that are not listed as point sources in part 122.27(b) of title 40 or other applicable federal regulations. Therefore, in the absence of legal authority establishing that such discharges should be regulated under the NPDES permit system, we conclude that the regional boards may issue waivers for discharges associated with timber harvesting subject to compliance with applicable requirements under Water Code section 13269. However, these waivers should include an express provision stating that they do not apply to discharges that require an NPDES permit pursuant to the Clean Water Act. Because the Waiver at issue does not include such a provision, we find it proper to insert one into the General Conditions.

IV. CONCLUSION

Based on the findings above, the State Board concludes that the Regional Board's actions were consistent with State Board policies and procedures and most of the terms of the Waiver do not exceed the Regional Board's statutory authority.

However, the provision of the Waiver requiring that CDF and BOF adopt and implement a water quality regulatory program and a timber harvest verification system makes the waiver for timber harvesting on non-federal land conditional upon future actions that are not under control of the Regional Board or potential dischargers, and which are not subject to verification in any apparent or specified manner. We also find it appropriate to include a provision indicating that the Waiver does not apply to discharges requiring an NPDES Permit, and to strike the phrase "herbicide application" from the definition of "Timber Harvest Activities."

V. ORDER

IT IS HEREBY ORDERED that:

1. Paragraph number 2 on Page 1 of Attachment A to Resolution No. R6T-2003-0001 is stricken.

2. The following language is added to the General Conditions as Paragraph number 8:

"This Waiver does not apply to discharges requiring an NPDES permit under the Clean Water Act, including silvicultural point sources as defined in 40 C.F.R. § 122.27."

3. The language "and herbicide application;" is stricken from the definition of "Timber Harvest Activities," in paragraph I.A.1. on Page 2 of Attachment A to Resolution No. R6T-2003-0001.

4. Regional Board staff shall participate in the interagency cumulative effects workgroup as appropriate considering staff resources and expertise to ensure that region-specific issues are considered.

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5. In all other respects, the petition is denied.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 22, 2004.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gary M. Carlton
Nancy H. Sutley

NO: None.

ABSENT: None.

ABSTAIN: None.


Debbie Irvin
Clerk to the Board